IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Writ Petition No.1731 of 2006

Popatlal Manakchand Bora

Age 62 years, Occ:Agriculture

and business residing at

Shriram Wadi, Ghoti (BK), Taluka

Igatpuri, District Nashik ..Petitioner

vs.

1. Trimbak Mahadu Bhangare

   Age 74 years, Occ: business

   residing at & post Ghoti (BK)

   Taluka Igatpuri, Dist. Nashik

   through his general power of

   attorney Prabhakar Trimbak Bhangare

   Age 46 years, Occ: service

   residing at Guruprasad Bungalow

   Maharudra Colony, Upnagar,

   Nashik 422 006

2. The State of Maharashtra ..Respondents.

Shri J.B.Kocheta for petitioner
Shri R.V.More for respondent no.1.

CORAM: S.B.MHASE J.
17th April, 2006

P.C.

1. Heard the learned Counsel.

2. Rule. Returnable forthwith with consent of the parties.

3. The order dated 5th January, 2006 passed by the Joint Civil Judge, Sr.Dn., Nashik below Exh.44 in Reg.Civil Suit No.191 of 1999 is challenged by filing this petition. The application Exh.44 was filed by the petitioner who is defendant no.2 in the said suit for amendment of the written statement and the counter claim. The said application is rejected on the ground that there is no separate written statement filed by the petitioner/defendant no.2 and he cannot amend the written statement of defendant no.1 and introduce the counter claim by way of amendment to the written statement. It is equally rejected on the ground that the petitioner/defendant no.2 has not filed separate written statement and, therefore, the petitioner cannot add the counter claim by way of further pleadings under Order VIII Rule 9 of the Code of Civil Procedure and that the cause of action as stated in the counter claim has arisen in the year 2003 and no explanation has been given by the petitioner/defendant no.2 as to why the application was not filed earlier.

4. The facts leading to this litigation which are not disputed are as follows:

5. That the dispute relates to the area of 300 sq.meters out of survey no.477/4/5 of village Ghoti Bd. Taluka Igatpuri, District Nashik. The area of the said survey no.477/4/5 is 5 Ares. Out of that 300 sq.meters is the property in dispute. It is constructed house bearing Gram Panchayat House Nos. 809 and 712. This property was originally owned by Manakchand Hazarimal Bora who was the father of the petitioner. Since the father of the petitioner had changed the user of the said land to non agricultural purpose without obtaining the permission from the Revenue Officer, Collector of Nashik by order dated 10th September, 1956 bearing No.OM.WS.II.2061 ordered to forfeit the said land in favour of the Government. On 19th August, 1957 Government took possession of the said land and by order dated 23rd June, 1962 bearing No.L.N.D./2081/62, Mamlatdar of Taluka Igatpuri ordered to delete the name of the said Manakchand and to enter the name of the Government in the record of rights and accordingly by mutation entry No.4269 the name of the said Manakchand was deleted and the name of the Government was entered. After the death of the said Manakchand in the year 1984, the petitioner submitted an application to the Collector requesting to regularise the change of user of the land and substitute the name of the petitioner in place of the Government in the record of rights. However, by order dated 9th June, 1986 bearing No.RB/Desk/3/CR.29/84, the Collector advised or directed

the petitioner to prefer an appeal before the Commissioner, Nashik Division, Nashik. Accordingly in the year 1986 the petitioner preferred the appeal before the Commissioner being Appeal No.266 of 1986. During the enquiry of the said appeal opinion of the Asstt.Director, Town Planning was sought who in turn recommended the Commissioner to change the user of the said land on certain terms and conditions and,therefore, on 27th December, 1988 the Commissioner allowed the said appeal filed by the petitioner and directed the Collector to conduct the detailed enquiry into the matter and to pass appropriate order. The Collector had forwarded the matter to Sub Divisional Officer, Nashik for further action. Sub Divisional Officer, Nashik after having conducted the enquiry on 28th February, 1989 called upon the petitioner to pay the penalty and other necessary charges to regularise the change of user of the said land. In view of the said demand the petitioner has deposited a sum of Rs.7996/- by way of revenue assessment for non agricultural purpose and further five times penalty of rs.8188.50 and, therefore, by order dated 3rd April, 1989 bearing No.Binsheti/Vashi/10/267/88 it was directed that the name of the Government be deleted from the record of rights and the name of the petitioner be entered. Accordingly mutation entry no.10797 was effected in the record of rights. At the time of taking of possession, the petitioner found that respondent no.1 has made

encroachment over the suit property and hence on 27th July, 1990 the petitioner submitted the application to the Sub Divisional Officer and requested him to remove the encroachment and to hand over vacant, actual and physical possession of the suit property. By order dated 8th March, 1991 Sub Divisional Officer disposed of the said application of the petitioner and informed him to approach the appropriate Court. The said order was challenged on 23rd April, 1991 by the petitioner by filing R.T.S.No.195 of 1991 before the Additional Collector. In that proceeding, notice was issued to respondent no.1 and after hearing the petitioner and respondent no.1, Additional Collector, Nashik allowed the said appeal on 31st March, 1994 and ordered to hand over possession of the suit property to the petitioner. Respondent No.1 being aggrieved by the said order passed by the Additional Collector, Nashik in RTS Appeal No.195 of 1991, filed revision application no.131 of 1994 before the Additional Commissioner, Nashik. Respondent No.1 had also filed an application before Additional Commissioner, Nashik for stay of the order dated 31st March, 1994 being revision application No.137 of 1994 wherein conditional stay till 30th June, 1994 was granted only to allow respondent no.1 to approach the civil court. Revision Application No.131 of 1994 was disposed of on 31st October 1994 by Additional Commissioner since respondent no.1 failed to approach and appear before the Additional Commissioner. Thus, it was

dismissed for want of prosecution. However, in view of order dated 17th June, 1994 passed by the Additional Commissioner in Revision Application No.131 of 1994, respondent no.1 had filed Special Civil Suit No.207 of 1994 on 9th June, 1994 before the Civil Judge, Sr.Dn., Nashik. In the said suit respondent no.1 had made a reference to all the above referred proceedings and orders and claimed that since 1966 respondent no.1 is in possession of the suit property and that on 24th February, 1977 respondent no.1 purchased the said property from Manakchand Hazarimal Bora, father of the petitioner. However, in view of the fact that the name of the father of the petitioner was removed from the record of rights, the sale deed could not be effected. He further made a grievance that in the above referred proceedings when the land was allotted to the petitioner he was not called in the enquiry. He further claimed that he has become the owner of the said property by adverse possession. Apart from the declaration of adverse possession, he further prayed that the order Binsheti/Vashi/10/267/88 dated 3rd April, 1989 was declared as not binding as against respondent no.1 and further made a prayer for perpetual injunction. In the said suit the present petitioner was defendant and the petitioner being the defendant in the said suit contested the said suit. The said Special Civil Suit No.207 of 1994 was decided by the Civil Judge, Sr.Dn., Nashik by judgment dated 21st December, 1996

holding that respondent no.1 has failed to prove the ownership by adverse possession. However, it was further held that respondent no.1's possession can certainly be called as a well settled possession and, therefore, respondent no.1 cannot be dispossessed without following due process of law. Under these circumstances, respondent no.1 gets possessory title and respondent no.1 is entitled to protect his possession until he is lawfully dispossessed. So far as the declaration in respect of the N.A.order dated 3rd April, 1989 being not binding is concerned, the said prayer was rejected and, therefore, ultimately the IIIrd Joint Civil Judge, Sr.Dn., partly decreed the suit perpetually restraining the petitioner from causing obstruction to the respondent/plaintiff in his possession over the suit house nos. 712 and 80-9 without following due process of law. Respondent no.1, therefore, being aggrieved with the said decree filed first appeal no.998 of 1997 in the High Court of Bombay. Along with the said First Appeal No. 998 of 1997 Civil Application No.5603 of 1997 was submitted for interim relief. However, the said Civil Application was disposed of on 1st December, 1997 by the Division Bench of this Court since the said application was not pressed by the respondent. Thereafter, in view of amendment to the Bombay Civil Courts Act, enhancement of the pecuniary jurisdiction of the District Courts the First Appeal No.998 of 1997 which was pending before the High Court of

Bombay was transferred to the District Court, Nashik and on 5th December, 2000 the said appeal was registered and numbered as Civil Appeal No.498 of 2000. Appeal No.498 of 2000 was decided by the IIIrd Additional District Judge, Nashik by judgment and order dated 21st February, 2003 and it was dismissed and thus the decree passed in Special Civil Suit No.207 of 1994 was confirmed.

6. Since the decree passed in Special Civil suit no.207 of 1994 provided that the petitioner shall not obstruct the possession of the respondent unless due process of law is followed, the petitioner approached the Sub Divisional Officer and Collector for giving possession of the said property in view of the earlier order passed by them referred to above and, therefore, on 14th August, 1997 notice was issued for delivery of possession, however, the possession could not take place. Therefore, another notice dated 4th February, 1999 was given. Since the Collector and Sub Divisional Officer started due process of law for delivery of possession in favour of the petitioner, respondent no.1 filed another suit bearing Reg.Civil Suit No.191 of 1999 before the Civil Judge, Sr.Dn., Nashik as against the State of Maharashtra being respondent no.2 in the present petition. The said suit was filed on 16th March, 1999 i.e. when the first appeal no.998 of 1997 was pending before this Court. In the said second suit all the above referred facts are stated by

respondent no.1. However, respondent no.1 this time claimed adverse possession as against respondent no.2 namely the Government of Maharashtra. In the second suit bearing No.191 of 1999 present petition was not joined as party defendant and it was simplicitor a suit as against respondent no.2 Govt. of Maharashtra. In the said suit the petitioner had filed an application to join himself as party defendant along with the State of Maharashtra. That application was allowed and, therefore, the petitioner was joined as defendant no.2 in Reg.Civil Suit No.191 of 1999. In the said suit respondent no.1 had filed an application Exh.5 seeking interim injunction as against the State of Maharashtra and, therefore, the State of Maharashtra, respondent no.2, had filed the say on Exh.5 and the written statement in the said suit on 15th April, 1999. After the petitioner was joined as defendant no.2 in the said suit, the petitioner filed purshis on 13th June, 1999 duly signed by the petitioner and his Advocate and informed the Court and stated that the say on Exh.5 and the written statement filed by respondent no.2, namely, the Government of Maharashtra is adopted by the present petitioner/defendant no.2. Thereafter application Exh.5 was decided on 17th August, 1999 and interim injunction order was passed as against the petitioner and respondent no.2. The said order was challenged by the petitioner by filing the Misc.Civil Appeal No.110 of 2000 before the District Judge, Nashik and the said appeal was decided by

the 3rd Additional District Judge, Nashik on 28th February, 2003 and the said Misc.Appeal was dismissed. Being aggrieved with the order passed below Exh.5 and Misc.Civil Appeal No. 110 of 2000 referred to above, the petitioner filed writ petition no.9153 of 2003 which was disposed of by the learned single Judge of this Court on 16th December, 2003. The learned single Judge refused to entertain the petition. However, when the learned Counsel for the petitioner submitted that the petitioner be given liberty to raise the issue about maintainability of second suit, the learned single Judge observed that the petitioner will be at liberty to raise the issue of maintainability of the suit at the appropriate stage and if the issue is raised the same may be dealt with on merits in accordance with law and uninfluenced by the liberty granted by this Court.

7. Apart from this it requires to be noted that when Misc.Civil Appeal No.110 of 2000 was dismissed by the 3rd Additional District Judge, Nashik it was observed that due process of law means that the petitioner should have filed the suit for possession instead of approaching the revenue authorities.

8. Taking into consideration the above stated facts and having found that the observations made by the Court that separate suit should have been filed the petitioner had

consultation with the Senior Lawyers who advised him that it will be appropriate to claim possession of the suit property in the pending suit and, therefore, after having narrated all the facts above and incorporating those facts application Exh.44 seeking amendment of the written statement and inclusion of the counter claim was submitted by the petitioner on 17th November, 2005. By way of counter claim it is to be noted that all the litigation which has been referred to above has been reflected from the pleadings of respondent no.1 from Special Civil Suit No.207 of 1994 and Reg.Civil Suit No.191 of 1999 and making reference to these facts by way of counter claim the possession of the suit property is being claimed by the petitioner through the Court and/or by appointment of the Commissioner. The further claim in respect of the mesne profits has been made.

9. Before this Court considers the validity of the impugned order it requires to be stated and observed that the facts as reflected are admitted by respondent no.2 in the said suit. they are equally reflected in the written statement filed by the State of Maharashtra in Reg.Civil Suit No.191 of 1999. Those will be found to be correct from the written statement filed by the petitioner in Special Civil Suit No.207 of 1994. This is being stated at this stage for the purpose that the facts being stated in the counter claim are in no way the new facts being

incorporated. On the contrary the counter claim is based on admitted facts between the parties. The claim for possession is being asked by way of counter claim because of the observations made by 3rd Additional District Judge in Misc.Appeal No.110 of 2000 wherein due process of law for taking possession was explained as a necessity to file separate suit for possession by the petitioner. Earlier decree passed in Reg.Civil Suit No.207 of 1994 simply stated that the respondent shall follow due process of law and, therefore, the respondent had approached to the revenue authorities who were in possession of the said property in view of the orders passed on 10th September, 1956 and since it is the case of the petitioner that respondent no.1 encroached into the said land while the land was in possession of the Government of Maharashtra, defendant no.2. It will be seen that even defendant no.2 was taking steps for delivery of possession but having realised that the observations of the 3rd Additional District Judge may create a problem the petitioner had thought it proper to amend the written statement and to introduce the counter claim. This will show the necessity to introduce the counter claim has arisen as a result of the decision of the Misc.Civil Appeal No..110 of 2000. It was not even necessary for the petitioner to file purshis adopting the written statement of Govt. of Maharashtra on 30th June, 1999 and, therefore, it will be inappropriate to observe that the application Exh.44 was filed belatedly

and without giving any explanation. In fact the said application states all these facts which are self explanatory to demonstrate that there was no inordinate delay. Apart from that taking into consideration the chequered history of the matter and various orders passed by the Courts and having noted the multiplicity of litigation between the parties, the Court should have found that in order to have full and final settlement and adjudication of the dispute between the parties, it is proper to allow the amendment of the written statement and introduction of the counter claim and in view of this the court should have exercised the discretion in favour of the petitioner so as to allow the application Exh.44. However, the civil Judge, Sr.Dn., has failed to have such approach.

10. The main controversy is as to whether there is a written statement of the petitioner on record. The facts as stated above will show that initially the petitioner was not party to the Reg.Civil Suit No.191 of 1999. The petitioner was joined as party in view of the application given by the petitioner. By that time say and written statement dated 15th April, 1999 of the Govt. of Maharashtra namely original defendant no.1 was on record and after joining to the said proceedings on 30th June, 1999 petitioner/defendant no.2 filed the purshis signed by him and his Advocate adopting the written statement of the

defendant no.1 State of Maharashtra. Relying upon the judgment in Ramesh Vs. Anil reported in A.I.R.2003 Supreme Court, 2508, wherein it is observed that in absence of written statement on record the counter claim cannot be added by way of amendment to the written statement or by way of any further pleadings under Order VIII Rule 9 of the Code of Civil Procedure. Civil Judge, Sr.Dn., observed that petitioner no.2 has joined the suit as intervenor and filed the purshis Exh.22 on 30th June, 1999 adopting the written statement of defendant no.1. Thus, defendant no.2 has not filed his separate written statement on record and he cannot amend the written statement of defendant no.1 and, therefore, he cannot add to the counter claim by way of amendment to the written statement. Similarly as he has not filed the separate written statement he cannot add the counter claim by way of further pleadings under Order 8 Rule 9 of the Code of Civil Procedure.

10. Therefore, these observations show that there is no separate written statement of the petitioner on record and since the petitioner has adopted the written statement of the State of Maharashtra defendant no.1 he cannot amend the written statement of other defendant. So also since there is no separate written statement by the defendant no.2/petitioner in view of the provisions of Order VIII Rule 9 of the Code of Civil Procedure a separate counter

claim cannot be permitted. Therefore, whole issue centers round as to whether there is a written statement of the petitioner/defendant no.2 on record or not. Apex Court has observed in the above referred judgment that there are three modes of pleading or setting up a counter claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain the counter claim which in the light of Rule 1 read with Section 6A would be the counter claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter claim may be filed by way of a subsequent pleading under R.9. In the latter two cases the counter claim though referable to R.6-A cannot be brought on record as of right but shall be governed by discretion vested in the Court either under Order VI Rule 17 of the Code of Civil Procedure if sought to be introduced by way of any amendment or subject to exercise of discretion conferred in the Court under Order VIII Rule 9 of the Code of Civil Procedure, if sought to replace on record by way of subsequent pleadings. The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings and save upon the Court’s time as also to exclude inconvenience to the parties by enabling the claims and counter claims, that is, all disputes between the same

parties being decided in the course of the same proceedings. If the consequence of permitting a counter claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter claim. The framers of law never intended the pleading by way of counter claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial and more so when the trial has already commenced. But certainly a counter claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit counter claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of the said counter claim being introduced by way of amendment, or there is no written statement available to include a counter claim therein. Equally there would be no question of a counter claim being raised by way of "subsequent pleading" as there is no ’previous pleading’ on record. Keeping in mind the above said ratio of the

Apex Court this Court has to find out whether there is a written statement of the petitioner on record. As stated earlier, there is a written statement of defendant no.1 State of Maharashtra which has been adopted by the petitioner by purshis. Order VI Rule 1 states that the pleadings shall mean plaint or written statement. Sub-rule (3) states that the forms in Appendix A when applicable, and whether they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings. Sub-Rule (14) states that every pleading shall be signed by the party and his pleader (if any) provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. Rule 15 is about the verification of the pleadings. It states that save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Rule 15(3) provides that verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. On going through these rules it will be seen that the plaint or written statement shall be in the form as provided in Appendix A and shall be signed by the party and pleader as provided under Rule

14 and shall be verified as provided in Rule 15. Written statement which has been filed by defendant no.1 State of Maharashtra is in the prescribed form as per Appendix A. It has been signed by the party as provided in Rule 14 and it has been verified by appropriate authority for defendant no.2 State of Maharashtra. By Exh.22 purshis the same has been adopted by the petitioner and the said purshis is signed by the petitioner and Advocate for the petitioner. The written statement of the Govt. of Maharashtra read along with the purshis Exh.22 is the written statement or pleading of the petitioner because instead of filing the same written statement by copying he has adopted the course of accepting it as it is and thereby the written statement by incorporation through Exh.22 purshis is on record and the written statement of defendant no.1 along with purshis of defendant no.2 together makes the written statement of defendant no.2. The only question remains about the verification. However, if Rule 15 is properly looked into it will be evident that every pleading shall be verified at the foot by a party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The portion underlined will show that a pleading which is verified by one of the parties is properly verified pleading under Rule 15. To demonstrate that if in a given suit there are 3 defendants and written statement is titled as "written

statement being submitted on behalf of defendant nos. 1 to 3" but at the end it is signed by one of the defendants and verified by one of the defendants along with the signature of the Advocate in view of Rules 14 and 15, it is the written statement of all the defendant nos. 1 to 3 even though there may not be the signatures of two defendants and verification by two defendants. This we come across in usual practice. However, this is protected by Rules 14 and 15. No doubt, it will be ideal that each of the party signs the written statement and each of the party verifies it as provided under Rules 14 and 15 of Order VI. The question is when one of the parties to the written statement either signs the written statement and/or verifies the written statement whether it is a valid written statement for the other when it is adopted by their pleader. The answer is it is the written statement of all the defendants. In the similar way in the present matter the written statement, which is duly signed, is on record and it has been adopted by defendant no.2/petitioner and, therefore, both the documents together make a composite written statement of defendant no.2/petitioner in the said suit and, therefore, in the facts and circumstances of the present case, it will be improper to infer that there is no written statement of the petitioner on record. Therefore, the main hurdle which has weighed with the Trial Court that there is no written statement of the petitioner/defendant no.2 is

removed. The Trial Court has failed to consider the effect of the written statement of defendant no.1 coupled with the purshis so as to understood the pleadings of defendant no.2/petitioner and, therefore, an error has cropped in the reasoning of the Trial Court in observing that there is no written statement of defendant no.2/petitioner on record. This Court finds that there is very much written statement of defendant no.2/petitioner on record which entitles the petitioner either to amend the written statement and introduced the counter claim under Order VI Rule 17 and/or Under Order VIII Rule 9. It is to be noted that under Order VI Rule 17 and under Order VIII Rule 9, the Court has to exercise discretion. That discretion has to be exercised for the purpose of avoiding multiplicity of the judicial proceedings and to save upon the Court's time as also to exclude inconvenience to the parties by enabling claims and counter claims, that is, all disputes between the same parties being decided in the course of the same proceedings. The Court has further to see that if the subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court. Looked to the facts of the present case, the facts which are being introduced by way of counter claim are admitted facts. The only prayer that the possession should be handed over to the petitioner is being

introduced. Thereby what is to be noted that as a result of allowing the counter claim neither the issue is made complicated nor the fresh case or facts are introduced which will necessitate taking up of fresh evidence for granting the relief of counter claim. On the contrary the Court has to consider on the basis of the facts which are practically admissible to the plaintiff whether the relief of counter claim namely of delivery of possession in favour of the petitioner is to be granted or not. On the contrary it will be seen that if the counter claim is allowed in the present facts and circumstances, inconvenience to the parties will be avoided, multiplicity of litigation will be equally avoided and all the issues between the parties would have been thrashed out and decided in one proceedings only. On the contrary the facts will show that it is the plaintiff who instead of clubbing together all causes of action is trying to multiply the litigation by filing separate suits from time to time isolating each of the defendants in his own way. Therefore, to over come such an attitude of the plaintiff/respondent no.1 allowing of the counter claim and exercise of discretion in favour of the petitioner was very much necessary. The facts of the case warrant only one finding that the Trial Court should have allowed the application Exh.44 in Reg.Civil Suit No. 191 of 1999. The ratio of the Apex Court judgment has been read in improper manner by the Trial Court. Isolated statement

has been picked up that if there is no written statement, counter claim cannot be allowed and the application came to be rejected. However, this Court finds that there is very much written statement and in the above mentioned facts and circumstances the counter claim ought to have been allowed. This counter claim ought to have been allowed under Order VIII Rule 9 because it becomes necessary because of the subsequent developments, namely, making of the observation by the IIIrd Additional District Judge in Misc.Appeal No.110 of 2000 to the extent that appropriate due process to be followed by the petitioner is to file a separate suit and, therefore, under Order VIII Rule 9 counter claim by way of subsequent or additional pleading should have been allowed by the Trial Court. This court finds that under these circumstances, the petition is worth to be allowed in the interest of justice for proper regularisation and channelisation of the disputes between the parties and for final adjudication of lis between the parties. Therefore, the following order is passed.

. Rule is made absolute in terms of prayer clauses (b) and (c) with no order as to costs.

. All other points inrespect of merits of the matter and limitation are kept open.

(S.B.MHASE J.)